SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1558

ROBERT S. WALKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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ROBERT S. WALKER, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case December 18, 1973. A petition for rehearing was denied March 18, 1974.

OPINION BELOW

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix I.

JURISDICTION

The judgment of the Court of Appeals was entered December 18, 1973. Petition for rehearing was denied March 18, 1974.

Jurisdiction to issue the writ is invoked, pursuant to the provisions of Title 28, Section 1254(1), United States Code.

Petitioner was convicted in the United States District Court for the Northern District of Georgia on twelve counts of a multicount indictment charging him with violations of the provisions of Title 18, Section 1341, United States Code, Title 18, Section 371. United States Code, and Title 15, Section 77q(a), United States Code.

QUESTIONS PRESENTED

1. Whether it constitutes a criminal offense punishable under Federal Securities and Mail Fraud Statutes to offer and sell securities in an insolvent corporation where the prospectus used in soliciting such sales clearly reveals that the company is insolvent

2. Whether the term "fraud" as used in Federal Securities and Mail Fraud Criminal Statutes contemplates local standards of "moral uprightness, fundamental honesty, fairplay and right dealings" as a test for determining whether or not a particular course of conduct constitutes fraud?

3. Whether convictions for violating both 18 United States Code Section 1341 (mail fraud) and also 15 United States Code, Section 77q(a) (securities fraud) on the basis of the defendant having mailed one single security to one individual on one particular day violates constitutional guarantees against double jeopardy?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the Constitution of the United States Provides:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

TITLE 15, SECTION 77q(a), UNITED STATES CODE provides:

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mail, directly or indirectly —
>
> (1) To employ any device, scheme, or artifice to defraud, or
>
> (2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

TITLE 18, SECTION 1341, UNITED STATES CODE, provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at a place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not

more than $1,000, or imprisoned not more than five years, or both."

TITLE 18, SECTION 371, UNITED STATES CODE Provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

STATEMENT OF THE CASE

Petitioner, along with Co-Defendants ROBERT B. BRUCE and ROBERT A. BLACKWOOD, was charged in a multi-count indictment in the United States District Court for the Northern District of Georgia with violations of the Federal Securities Act (15 U.S.C.A. § 77q(a)) and the Mail Fraud Statute (18 U.S.C.A. § 1341) and conspiracy to violate such statutes (18 U.S.C.A. § 371). The factual background giving rise to the indictment is complex, extended and of little import here. Essentially, however, the case grew out of the failure of the American Capital Corporation of which Defendant Walker was president, Defendant Blackwood was secretary and Defendant Bruce was the independent auditor. American commenced operations during mid-December, 1966, and ceased doing business in late April, 1969. Of the $215,960.84 received from inves-

tors, none was available for repayment to investors when the company ceased operations.

In essence, the government charged that the demise of American Capital Corporation was preordained and that the sale of its securities to investors was part of a plot to bilk unsuspecting victims by beguiling them with false and misleading prospectuses thereby deceiving them into investing money in the Corporation so that the Defendants could thereafter enrich themselves by misappropriating these funds. In furtherance of this theory, the government concentrated its attack on nine particular statements contained in the prospectuses of American Capital Capital Corporation which it contended to be misleading, though admittedly not false.[1]

Significantly (and herein lies the thrust of the Petitioner's Application for Writ of Certiorari) both the District Court who tried the case without a jury and the Court of Appeals apparently rejected the government's theory that these nine statements were criminally misleading. Nonetheless, the District Court convicted the Defendant and the Court of Appeals affirmed the conviction on the novel theory that the act of selling securities in an insolvent corporation constitutes a criminal offense under the Federal Securities Act, despite the fact that the prospectus clearly and unequivocally showed that the Corporation was insolvent.[2]

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[1] The nine alleged statements and a summary of the argument relating to them is set forth in the appellant's brief to the Fifth Circuit, included in the record in this cause. Since those nine statements are not involved in this Application for Certiorari, they are not set forth herein. However, the brief of the Appellant below is hereby incorporated herein by reference for all purposes.

[2] In the words of the Court of Appeals, "On the face of the financial statements contained in the new prospectus, it is obvious that the Company was solvent." Slip op at p. 5.

Defendant Walker was convicted on twelve of fifteen counts included in the indictment and was sentenced to serve three years in federal custody on each count, with the sentences to run concurrently. From that conviction an appeal was duly perfected to the Fifth Circuit Court of Appeals, from whose decision affirming the conviction this Application for Writ of Certiorari has been filed.

REASONS FOR GRANTING THE WRIT

This case presents three distinct questions of far reaching significance involving the scope of federal criminal statutes regulating securities transactions. With regard to each of these three questions, the Fifth Circuit has announced new and far reaching standards which could have a most profound effect nationwide and therefore merit this Court's scrutiny and consideration before inter-circuit conflict develops greatly complicating an already complex area of the law.

I.

The Fifth Circuit erred in affirming the District Court's pronouncement that the act of offering securities in an insolvent Company is per se violative of federal securities and mail fraud laws, even if the prospectus clearly says on its face that the Company is insolvent at the time.

The reason why the Defendant was convicted is plainly set forth in the District Court's Opinion: "By the time of the issuance of that prospectus on April 5, 1968, all of the Defendants knew and could not have failed to know that the business they were conducting was a fraud * * * The very balance sheet and statements of condition *contained in the second prospectus*, which were prepared by Defendant Bruce from information supplied by Defendants Blackwood

and Walker, showed on their face that for the year 1967 the Company had incurred a net loss of $131,825.00 and that for the period from January 1, to February 13, 1968, it had incurred a net loss of $693,196.50. The balance sheet as of February 16, *likewise appearing in the second prospectus,* showed a deficit net worth at that time of $89,005.33 and an earned deficit, after quasi-reorganization, of $112,452.63." Similarly, the Court of Appeals confirmed the conviction because, "On the face of the financial statements *contained in the new prospectus,* it was obvious that the Company was insolvent." (Emphasis supplied)

The prospectus in controversy clearly disclosed that the Company had a deficit net worth of $89,000.00 and it had incurred a net operating loss during the previous year in excess of $800,000.00 (including a non-recurring loss on the foreclosure of certain real estate in the amount of $682,000.00). Liabilities were listed at $244,000.00 against assets of only $155,000.00. The prospectus also revealed, no fewer than three times, that a subsidiary of the Company had just come out of bankruptcy proceedings. No one contests — indeed it is the very basis of the District Court's verdict — that the financial statements of the Company contained in the prospectus clearly revealed, "on their face", that the Corporation was insolvent at the time.

Thus, the most significant question presented in this case can be simply stated: Do the Federal Securities Act and the Federal Mail Fraud Statutes prohibit the offer and sale of securities in an insolvent Company where the prospectus used clearly shows the Company to be insolvent?

The significance of the case is self evident. Despite the fact that the Federal Securities Laws were originally promulgated simply to insure full disclosure in securities transactions, the scope of the laws has been greatly expanded

to include, as well, protection of potential investors against loss in financially risky ventures which ultimately fail. If the activity of the Defendants in this case constitutes a violation of Federal Securities Laws and the Mail Fraud Statute, then every person offering securities in a financially troubled business which ultimately fails faces the prospect of federal prosecution. What the Defendant was guilty of was selling securities in a failing business, whose prospectus, by the Court's admission (indeed, reliance) clearly indicated the dire financial condition of the business.

The Court of Appeal's holding marks a major development in securities fraud cases. Heretofore the test for determining fraud has been whether or not the prospectuses were false or misleading. The apparent purpose of the criminal statutes was to assure that potential investors were not misinformed about the condition of the business. With the new interpretation given to the statutes by the Fifth Circuit, however, assuring complete disclosure is no longer the function of the federal laws. Rather, the laws as now interpreted make it unlawful to offer securities in a financially troubled business, even if the dire financial circumstances are fully revealed and disclosed. Defendants strenuously argue that such activity is not prohibited by the Federal Mail and Securities Statutes and that such laws were never intended to effect that result. The conduct for which the Defendants were convicted, offering securities in an insolvent Company on the basis of a prospectus which clearly revealed that insolvency, simply is not within the purview of the present law. It is not — or more correctly, was not previously — against the law.

In this regard, the Fifth Circuit failed to perceive the significance of this Court's recent decision in the case of *Bronston* v *United States*, 1973, ... U.S. ..... Supreme Court ....., ... L. Ed. 2d ..... In that case this Court was

asked to determine whether the federal perjury statute should be broadly construed to encompass statements which were argueably misleading by negative implication or strictly construed to prohibit only literal untruth. This Court concluded that "the vague rubric of 'intent to mislead' or 'perjury by implication'" was improper as a standard for federal perjury convictions, expanded the intent of Congress in passing the Federal Perjury Statute, and exceeded the literal requirements of the Federal Statute. Accordingly, Bronston's conviction for perjury was reversed.

The Court of Appeals has made the same error in this case that the Second Circuit made in the *Bronston* case. Despite the literal correctness of the financial statements, the implication of possible success inherent in the act of offering the securities for sale constituted misleading conduct which was therefore deemed fraudulent. But if the prospectus is literally true and shows unequivocally that the company is in dire financial straits, does the act of offering such securities for sale nonetheless constitute a criminal offense? This is the question of obvious national significance which the Petitioner suggests should be answered in the negative and requests this Court to consider by Writ of Certiorari.

II.

In its decision in this case, the Fifth Circuit announced a new and far reaching definition of "fraud" which greatly expands the scope of the federal jurisdiction in every day business transactions. "Essentially, a scheme to defraud is measured by a nontechnical standard. 'It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society', *Gregory* v. *United States*, 5 Cir., 1958,

253 F.2d 104, 109." Slip Op. at P. 12. The Court explains that a scheme to defraud need not even be fraudulent or misrepresent any material fact to be a violation of federal law, if persons of ordinary prudence and comprehension could be misled as to the *possible* future value of an investment in a particular business endeavor.

The implications of such an expansion of the definition of federal fraud offenses are self-evident. In the first place, fraud cases now become like obscenity cases. The question which determines criminality is not whether there was an intent to obtain money or property through false pretenses (or failure to disclose material facts), but rather, whether the course of business dealings of the Defendant adequately reflected the community's ideals of "moral uprightness" and "right dealing", whatever those terms mean. If a businessman does not "play fair", and, incidentally he uses the United States mails, he is guilty of a federal mail fraud, under the new definition of that statute supplied by the panel opinion. Significantly, though the opinion details the Government's allegations in some detail, it never states that any one act of the Defendants was false or misleading. Instead, the Court simply holds that the record, taken as a whole, contained substantial evidence that the Defendants' actions did not reflect "moral uprightness, fundamental honesty, fair play and right dealing."

The place where the Fifth Circuit apparently erred in concluding that the federal mail and securities fraud statutes encompassed "immoral" business activity even in the absence of misrepresentation of or omission of material facts or a scheme fraudulent upon its face, is in believing that the word "deceive" in the statutes encompasses activity broader than misrepresentation. Clearly this is not so. The Court attempts to make a distinction which simply is inefficacious. "The scheme need not be fraudulent upon its

face or misrepresent any material fact. All that is necessary is that it be a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension." Slip Op. at P. 12. *Black's Law Dictionary*, however, defines the word "deceit" as "a *fraudulent* and cheating *misrepresentation*, artifice, or device used by one or more persons to deceive and trick another, *who is ignorant of the true facts*, to the prejudice and damage of the party imposed upon.*** A *fraudulent misrepresentation* or contrivance, by which one man deceives another, *who has no means of detecting the fraud*, to the injury and damage of the latter.*** To constitute 'deceit', the statement must be untrue." Lay dictionaries concur with this definition. For example, *Webster's Seventh New Collegiate Dictionary* defines the word "deceit" as "to cause to believe an untruth" and the lead synonym listed is "mislead".

Marginal as was the evidence of misrepresentation, even more non-existent was the evidence of deceit, at least as that term is defined by *Black's*. Deceit requires that the victim "is ignorant of the true facts" and "has no means of detecting the fraud". By the Court's admissions, the insolvency of the Company was unequivocally apparent on the face of the prospectus given to each potential investor. And, as the Court's opinion admits, it was obvious on the face of the financial statements contained in the prospectus that the Company was insolvent. Where then lies the deceit? The means of detecting the alleged fraud was given to every investor and, by the Court's admission, not even the Government contended that the statements contained therein were untrue.

Surely the federal fraud statutes, touching as they do the activities of innumerable businessmen everyday, require definition with greater clarity than that presented in the Court's opinion. At the very least, the semantic difficulties

posed by the Court's confusing attempt to distinguish between misrepresentation and deceit demands further explication by way of certiorari.

III.

Counts II and XII of the inditement, both of which the Defendant was convicted of and sentenced for, are virtually identical. Count II reads as follows:

> "1. The Grand Jury realleges all of the allegations contained in paragraphs 1 to 18, inclusive, to Count One to this indictment.
>
> 2. On or about November 3, 1967, the defendants and West did willfully and unlawfully, in the offer and sale of a security, namely, the common stock of American Capital Corporation, by use of the mails, employ the aforesaid scheme and artifice to defraud, obtain money and property by means of untrue statements of material facts and omissions to state material facts in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which operated as a fraud and deceit upon the purchasers of said securities, including Thomas D. Wyatt, said use of the mails being as follows: On or about November 5, 1967, in the Northern District of Georgia, the defendants and West willfully caused a letter dated November 3, 1967, enclosing a stock certificate of American Capital Corporation, to be delivered by the Post Office Department to Thomas D. Wyatt, 512 Fairground Street, Apt. B, Marietta, Georgia, 30060; in violation of Section 77q(a), Title 15, U.S. Code."

Count XII charged as follows:

> "1. The Grand Jury realleges all of the allegations contained in paragraphs 1 to 18, inclusive, of Count One of this indictment as constituting and describing

a scheme and artifice which the defendants and West devised and intended to devise to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises.

2. On or about November 3, 1967, in the Northern District of Georgia, the defendants for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, unlawfully, willfully and knowingly cause to be delivered by U. S. Mail according to the direction thereon an envelope and contents addressed to Mr. Thomas D. Wyatt, 512 Fairground Street, Apartment B, Marietta, Georgia, 30060, said contents consisting of a letter on American Capital Corporation; in violation of Section 1341, Title 18 U.S. Code."

As can be readily seen, both Counts charged (1) all of the allegations contained in Count I of the indictment; (2) a scheme and artifice to defraud; (3) the mailing of a letter and stock certificates to Mr. Thomas D. Wyatt, 512 Fairground Street, Apt. B, Marietta, Georgia, 30060, on November 3, 1967.

Petitioner's objection that conviction on both Counts constitutes double jeopardy was rejected by both the District Court and the Court of Appeals. The Fifth Circuit ruled that since there was an element in the § 77q(a) provision which was not present in the § 1341 conviction (the offer or sale of a security), there is no "complete mutuality" of offenses and therefore the double jeopardy clause is not offended.

The proper test for determining whether or not a double jeopardy problem is presented is not whether there is "complete mutuality" but whether *each provision requires proof of a fact which the others do not.*" Gravieres v. United States, 1911, 220 U.S. 338, 342, 31 S.Ct. 421, 55 L. Ed.

489. Obviously, the mail fraud provision (§ 1341) does not require proof of any fact which is not required in the securities fraud provision. Accordingly, conviction on both counts could not stand under the "each provision" test of *Gravieres*. The Fifth Circuit, however, has announced a new double jeopardy test which changes the word "each" to the word "either" in the prior standard. Thus, under the new test announced by the panel below, the test to determine whether there are two offenses or only one is whether *either* provision requires proof of a fact which the other does not. Since the security fraud provision required proof of an offer or sale of securities, but the mail fraud provision did not, the panel held that there was no violation of double jeopardy.

The clear departure from prior law marked by the new test is most obvious in the context of the federal bank robbery cases. A person cannot be convicted on both 18 U.S.C.A. § 2113(a) and (b) for the same bank robbery. *United States* v. *Foy,* 5 Cir., 1971, 441 F.2d 398. The two sections are identical, except that 2113(a) requires proof of an additional element — force and violence or intimidation. If the Fifth Circuit's new double jeopardy standard is retained, however, conviction under both (a) and (b) would be acceptable since (a) requires proof of an element which (b) does not require. In fact, the whole concept of "lesser included offense" is obliterated by the panel's new double jeopardy standard, and for this reason alone, the opinion is certworthy.

Explained symbolically for ease of understanding, suppose that Offense I required proof of elements (a), (b) and (c), and Offense II required proof of element (a), (b) and (d). Conviction on both counts would not constitute double jeopardy in that case because *each* provision

requires proof of an element which the other provision does not. Offense I requires proof of element (c) (which Offense II does not require) and Offense II requires proof of element (d) (which Offense I does not require). If, on the other hand, Offense I required proof of elements (a) and (b) only, conviction on both counts would constitute double jeopardy, because, while Offense II does require proof of an element not required to prove Offense I (namely, element (d)), Offense I does not require proof of any element not required to prove Offense II. This, of course, is precisely the situation with the case at bar and the statutes involved herein. As the Court points out, only the § 77q(a) violation requires proof of an element not present in the § 1341 charge. There is nothing in the § 1341 offense which is not also present in § 77q(a) offense.

Perhaps the Court's holding resulted simply from a misapplication of existing law and was not intended to abandon the prior test as it in fact did. Nevertheless, the holding is far reaching. Moreover, as the decision now stands, a new standard has been announced and Supreme Court consideration of such a significant new theory of double jeopardy is clearly indicated.

CONCLUSION

The Fifth Circuit has announced several far reaching new standards which deserve the consideration of this Honorable Court. The issues are of obvious significance nationwide and ought to be considered by this Court. Therefore, the Application for a Writ of Certiorari ought to be granted.

Respectfully submitted,

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